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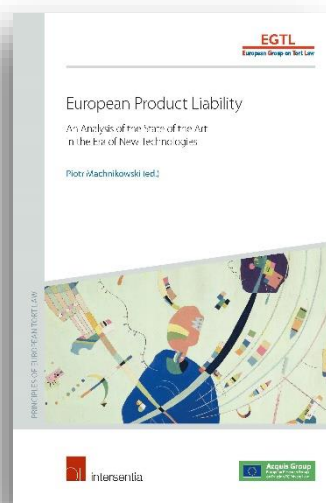


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# PRODUCT LIABILITY IN ENGLAND AND WALES

Ken OLIPHANT and Vanessa WILCOX

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## I. SOURCES OF LAW AND THEIR EVOLUTION

### A. PRE-DIRECTIVE 85/374/EEC RIGHTS AND REMEDIES

01 Prior to the implementation of Directive 85/374/EEC a victim of a product defect could bring himself within one or more of several legal categories, all of which continue to exist today. In particular, an action lay in tort and contract, and criminal consequences could also follow.

#### 1) *An Action in Tort*

02 It was in the spring of 1932 that the (then) House of Lords handed down judgment in what would arguably become the most famous case in the common law: *Donoghue v Stevenson*.<sup>1</sup> Their Lordships ruled there that the manufacturer of any article, apart entirely from contract, owes a duty to its 'neighbour' – on the facts, the ultimate consumer of a bottle of ginger beer – to take reasonable care to ensure that the article is carefully produced. The case created the modern concept of negligence, the most common basis of litigation in *tort*. Tort's appeal lay in its extension to persons other than the actual ultimate purchaser, the drink in *Donoghue v Stevenson* having been paid for by the claimant's friend. Its major disadvantage, however, was and remains the need to prove negligence. *Daniels and Daniels v R White & Sons Ltd and Tarbard*<sup>2</sup> – a case that arose subsequently – is illustrative of the difficulties that inhered in framing one's action in tort. The facts, personal injury arising from a defective bottle of lemonade, relate closely to those in *Donoghue v Stevenson*, but the claim against the manufacturer in tort failed in *Daniels and Daniels* since the manufacturer was found to have adopted a 'fool-proof method of cleaning, washing and filling bottles'<sup>3</sup> and effectively supervised the process so that the presence in the bottle of 38 grains of carbolic acid could not have been attributed to its negligence.

#### 2) *An Action in Contract*

03 A right of action founded on *breach of contract* co-existed alongside that in tort. However, the former action was and is of course limited to instances where there is a direct contractual relationship between the parties (cf the position under the Contracts (Rights of Third Parties) Act 1999, discussed in no 75). Thus, despite the fact that '[b]oth husband and wife drank almost simultaneously'<sup>4</sup> in *Daniels and Daniels* above, while Mr Daniels succeeded against the retailer,

<sup>1</sup> [1932] AC 562. Cf *Winterbottom v Wright* (1842) 10 M&W 109.

<sup>2</sup> [1938] 4 All ER 258.

<sup>3</sup> [1938] 4 All ER 258, 262 per Lewis J.

<sup>4</sup> [1938] 4 All ER 258, 260 per Lewis J.

the absence of privity was fatal to Mrs Daniels' action.<sup>5</sup> Mr Daniels' claim was based on implied conditions as to quality or fitness of goods sold in the course of a business under sec 14 of the Sale of Goods Act 1893 (now sec 14 of the Sale of Goods Act 1979 and in the case of an agreement between a trader and a consumer, as on the facts in *Daniels and Daniels*, secs 9 and 10 of the Consumer Rights Act 2015, which entered into force on 1 October 2015). In addition, an action lies, *inter alia*, for breach of sec 13 of the Sale of Goods Act 1979 (implied term in sales by description; now sec 11 of the Consumer Rights Act 2015 in the case of consumers) which states that goods are to be sold as described. Equivalent terms also exist in respect of hire-purchase agreements<sup>6</sup> and other contracts.<sup>7</sup> The legislature has also stepped in to ensure that the above implied terms, among others, cannot be excluded or restricted by reference to any contract term as against a person dealing as a consumer.<sup>8</sup> Despite the mentioned drawback of privity, an action in contract benefits from the fact that, in contrast to tort, fault generally need not be proved. Moreover, all reasonably foreseeable damage, whether to persons, property or pocket, is compensable.

## B. IMPLEMENTING DIRECTIVE 85/374/EEC

**04** The inadequacies inherent in the existing causes of action led to huge debates in the USA and the changes effected there fed into discussions in the UK, as well as influencing the European legal landscape. Around the time when the Council of Europe was setting out the terms of what would become the European Convention on Products Liability,<sup>9</sup> which sought to introduce a strict product liability regime into Europe, Britain was still coming to terms with the thalidomide disaster. A Royal Commission on Civil Liability and Compensation for Personal Injury, under the leadership of Lord Pearson, sat to consider the law relating to compensation for personal injury caused, *inter alia*, 'through the manufacture, supply or use of goods or services'.<sup>10</sup> This was followed by consultations and subsequent recommendations by the English and Scottish Law Commissions whose terms of reference, insofar as protected interests were

<sup>5</sup> Cf *Priest v Last* [1903] 2 KB 148 where the claimant recovered expenses incurred in the treatment of his wife for the injury occasioned to her by the use of a hot-water bottle he had purchased.

<sup>6</sup> Supply of Goods (Implied Terms) Act 1973, sec 9 f. The Consumer Rights Act 2015 also covers hire-purchase agreements between traders and consumers: sec 3(2)(c).

<sup>7</sup> Supply of Goods and Services Act 1982, secs 3 f and 9 f. The Consumer Rights Act 2015 also covers contracts between traders and consumers for the hire and transfer of goods (sec 3(2)(b) and (d)) and contracts for the supply of digital content (Chapter 3) and services (Chapter 4).

<sup>8</sup> Formerly regulated under the Unfair Contract Terms Act 1977; now contained in sec 31 of the Consumer Rights Act 2015 in the case of consumer contracts. See also Consumer Rights Act 2015, secs 47 and 57, and Part 2.

<sup>9</sup> CETS No 091. Strasbourg, 27.01.1977.

<sup>10</sup> (1978) Cmnd 7054, vol 1, Ch 22 (para 1193).

concerned, were much broader than those of the Pearson Commission.<sup>11</sup> As the above investigations coincided with the European Commission's preliminary draft directive for defective products, which was eventually adopted as Directive 85/374/EEC, the English and Scottish Law Commissions' work came to naught. Instead, Directive 85/374/EEC was implemented by way of Part I of the Consumer Protection Act 1987 (CPA). Part I of the Act entered into force on 1 March 1988. Directive 85/374/EEC was subsequently amended by Directive 1999/34/EC and the changes required by it were given effect to in the Consumer Protection Act 1987 (Product Liability) (Modification) Order 2000 (see no 06 below).<sup>12</sup> Section 1(1) of the CPA expressly provides that the Act shall be construed to comply with the Directive. Although criticised,<sup>13</sup> at least one judge has ruled that 'insofar as the wording of the CPA ... differs from the equivalent Articles in the Directive, it should not be construed differently from the Directive; and consequently the practical course [is] to go straight to the fount, the Directive itself'.<sup>14</sup>

05 Directive 85/374/EEC allowed Member States options in three areas: first, they could, by way of derogation, provide in their legislation that a 'product' under art 2 also meant primary agricultural products and game: art 15(1)(a); second, they could derogate from the development risk defence under art 7(e) which allows a producer to escape liability where the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered: art 15(1)(b); and finally, they could limit a producer's total liability for damage resulting from a death or personal injury to an amount which may not be less than 70 million ECU: art 16(1). How the UK exercised these options is set out below.

06 First, like the Directive, the UK adopted a vague *definition of 'product'* under sec 1(2) of the CPA: 'product' means any goods or electricity and includes a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise. Moreover, 'product' extended to things subjected to 'an industrial or other process': sec 1(2)(c). The UK did not derogate from art 2 of the Directive so that only *processed* primary agricultural products and game were caught. As former sec 2(4) stated, the CPA did not apply 'to a person in respect of any defect in any game or agricultural produce if the only supply of the game or produce by that person to another was at a time when it had not undergone an industrial process.' Liability for processed food did not attach to the primary producer, therefore, but to the processor and, where applicable, the producer of the final product, ie 'the fruit pulp producer and fruit

<sup>11</sup> Liability for Defective Products (1977) Cmnd 6831.

<sup>12</sup> Statutory Instrument 2000 No 2771.

<sup>13</sup> A Arnall, Product Liability and the Effect of Directives (2001) 26 European Law Review 213, 214.

<sup>14</sup> A v The National Blood Authority [2001] 3 All ER 289, at [2] per Burton J.

pie maker but not the fruit grower'.<sup>15</sup> As mentioned in no 04 above, Directive 1999/34/EC (in its art 1(2)) eventually amended Directive 85/374/EEC to extend the scope of the provisions of the latter Directive to *primary agricultural products and game*, whether processed or otherwise, as a result of concerns over BSE (bovine spongiform encephalopathy). This change was implemented by the Consumer Protection Act 1987 (Product Liability) (Modification) Order 2000, which entered into force on 4 December 2000. Article 2(3) of the Order provides for the omission of sec 2(4) from the CPA.

07 Second, the UK chose not to exclude the *development risk defence*, which is laid down in sec 4(1)(e) of the CPA. The provision, which was subject to an unsuccessful challenge by the European Commission, reads that it shall be a defence for the producer 'that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control'. The Commission had argued unsuccessfully that, unlike the relevant article of the Directive, which calls for an objective assessment, sec 4(1)(e) of the CPA depends on the subjective knowledge of a producer taking reasonable care.<sup>16</sup> The defence is given fuller treatment in no 64 below.

08 Third, the UK declined to impose a *ceiling on liability*. In response to the Commission's Green Paper on Liability for Defective Products,<sup>17</sup> the UK said that it continued in its belief that setting such a limit could lead to injustices in cases with multiple claims on the one hand and lengthy delays in the payment of compensation awards where there is a possibility of further claims in respect of the same products on the other.<sup>18</sup>

## C. SCOPE OF THE CONSUMER PROTECTION ACT 1987

09 The UK legislature adopted a mixed bag approach insofar as transposing the 1985 Directive was concerned: (i) some aspects of the Directive are given effect in the CPA; (ii) the CPA also delegates issues encompassed in the 1985 Directive to certain enactments; (iii) as it does issues not encompassed in the Directive but nevertheless related to product liability; and finally (iv) some issues are left to general principles of national law. In particular:

<sup>15</sup> J Stapleton, *Product Liability* (1994) 304.

<sup>16</sup> Case C-300/95 *Commission v United Kingdom* [1997] ECR I-2649.

<sup>17</sup> COM(1999)396 final.

<sup>18</sup> United Kingdom response to the Commission's Green Paper on Liability for Defective Products, 15 January 2014, Ares(2014)74687, 4 <<http://ec.europa.eu/DocsRoom/documents/1496/attachments/1/translations/en/renditions/pdf>>.

- (i) The core sections of the 1987 insofar as defective products are concerned are secs 1–7. Section 1 sets out the purpose and construction of Part I of the 1987 Act (including the definition of ‘product’). This corresponds with art 2 of the Directive; sec 2 defines who may be liable (corresponding with arts 1 and 3), and it lays down the rule of liability in the case of multiple tortfeasors (implementing art 5) and expressly states that a claim under the Directive operates without prejudice to other rights and remedies (enacting art 13). The meaning of ‘defect’ is dealt with under sec 3 (cf art 6), available civil defences are enumerated in sec 4 (cf art 7) and damage is defined in sec 5 (cf art 9). The prohibition on exclusions from liability under sec 7 corresponds with art 12.
- (ii) Section 6 deals with the application of certain enactments and in particular sec 6(8) – on nuclear installations – finds its equivalent in art 14 of the Directive. The short- and long-stop limitation periods set out in arts 10 and 11 of the Directive respectively are not given effect in the 1987 Act itself, but rather the Directive precipitated an amendment to the Limitation Act 1980 which since then has regulated actions in respect of defective products under the thereby inserted sec 11A.<sup>19</sup> Articles 5 and 8 of the Directive refer to the preservation of national law concerning the right of contribution or recourse (which is regulated by the Civil Liability (Contribution) Act 1978). In line with art 8(2) of the Directive, on contributory negligence, sec 6(4) CPA refers to the Law Reform (Contributory Negligence) Act 1945. Under art 9 of the Directive, damage includes damage caused by death, an issue dealt with under the Fatal Accidents Act 1976.
- (iii) As mentioned, the CPA also deals with the application of certain enactments not expressly covered by the Directive, including the Congenital Disability (Civil Liability) Act 1976. Suffice to say at this stage that the effect of the section is to flesh out the liability element of those provisions in respect of claims arising in the context of defective products.
- (iv) General principles of national law are left to govern certain issues such as causation, the quantum of damages, procedure (including the burden of proof (cf art 4)) and the calculation of interest payable.

#### D. IMPACT OF THE CONSUMER PROTECTION ACT 1987 ON EXISTING RIGHTS AND REMEDIES

10 In practice, relatively few claims are brought under the 1987 Act (see no 86 ff), which can be relied upon in addition to existing rights and remedies (as envisaged by sec 2(6) CPA).<sup>20</sup>

<sup>19</sup> See sec 6(6) and sch 1 CPA.

<sup>20</sup> Section 2 lays down the liability for defective products. Section 2(6) reads: ‘This section shall be without prejudice to any liability arising otherwise than by virtue of this Part.’ See



## E. SPECIAL LIABILITY REGIMES FOR NEW TECHNOLOGIES

11 The difficulty with addressing the topic of special liability regimes for new technologies is that what is ‘new’ is of course relative. Moreover, ‘old’ special liability regimes exist but are capable of applying to emerging technologies in the industries in question. This is the case, for example, with respect to sec 1 of the Employer’s Liability (Defective Equipment) Act 1969 which imposes strict liability on an employer for personal injury to an employee as a result of a defect in equipment provided by his employer where the defect is attributable wholly or partly to the fault of a third party (whether identified or not). The Act only applies where the damage arose in the course of the employee’s employment. The provision cannot be excluded or limited but applies without prejudice to the law relating to contributory negligence and any remedy by way of contribution or in contract or otherwise which is available to the employer in respect of the injury: sec 1. If the damage is caused by a 3D printer, for example, or some other ‘newly’ developed equipment, there is no doubt that the provision would nonetheless apply.

12 Two other, more specific liability regimes may also be mentioned. First, the Vaccine Damage Payments Act 1979 provides, *inter alia*, for the payment of a statutory sum by a person who is severely disabled as a result of vaccination against any of the diseases to which the Act applies.<sup>21</sup> New vaccines are periodically developed and approved and this may involve the use of new technologies. However, it appears that these would still be regulated under the 1979 Act.

13 Second, the Human Fertilisation and Embryology Act 1990 (as amended)<sup>22</sup> regulates aspects of reproductive and regenerative medicine. In particular, sec 44 amends the Congenital Disabilities (Civil Liability) Act 1976 so that the latter provides, in its sec 1A, for a civil action for disabled children who were born ‘as the result of the placing in [their mother] of an embryo or of sperm and eggs or her artificial insemination’. In 2015, Parliament approved new Regulations under the 1990 Act that allow the practice of a novel form of reproductive medicine, mitochondrial donation (resulting in what are popularly known as ‘three-person babies’).<sup>23</sup> Liability continues to be regulated under the Act of 1976. Though use of the new technique is the provision of a service as opposed to the supply of a product, the service is one which may well rely on medical products.

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*M Lunney/K Oliphant*, Tort Law: Text and Materials (2013) 595 for possible reasons as to why consumers are slow in bringing actions under the CPA.

<sup>21</sup> That is, diphtheria, tetanus, whooping cough, poliomyelitis, measles, rubella, tuberculosis, smallpox, and any other disease which is specified by the Secretary of State for the purposes of this Act by order made by statutory instrument: sec 1(2).

<sup>22</sup> See also Human Fertilisation and Embryology Act 2008, sch 6 clause 14 f.

<sup>23</sup> Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015.

14 Moving on to possible reforms: in February 2015 the Department for Transport (DfT) published a document, 'The Pathway to Driverless Cars: A Detailed Review of Regulations for Automated Vehicle Technologies',<sup>24</sup> which included a summary of responses to a consultation on the subject. The brief section on liability issues is reproduced here:<sup>25</sup>

'The major theme throughout many of the questions posed to stakeholders was liability. Respondents were concerned about how liability would be apportioned in the event of a collision and who would take responsibility for this if the vehicle was in control at the time.

While many felt the existing liability regime would be sufficient for testing to go ahead, almost equal numbers foresaw problems and the need for changes to be made.

There was general agreement that vehicle manufacturers should continue to be held strictly liable for mechanical and system failures as is already the case for emergency braking and cruise control systems. It was suggested that vehicle manufactures should also accept liability for the software in their vehicles.

Many respondents focused on the difficulty of establishing whether the driver or the automated system was in control of the vehicle at the time of a collision or other event. The use of independent event data recorders and camera systems were recommended to address this.

It was suggested that thought should be given to the wider liabilities, for example road maintenance and information providers.'

15 The report also highlighted potential difficulties for claimants seeking to rely on existing rights and remedies:<sup>26</sup>

'Due to the complexity of the technologies involved, a claimant may need to call on expert evidence. For example, an expert may be needed to prove to a court that a collision could only have happened through a malfunction of the technology and not by any other action of the claimant.

Equally, establishing exactly what may have been considered to be "state of the art" at the time of the vehicle's development could again require detailed technical expertise.

The complexity of the technologies involved, the cost of obtaining expert witnesses and the potential for evidence of any manufacturing defect to be destroyed in a subsequent collision could mean that the chances of bringing successful product liability claims against automated vehicle manufacturers are limited.'

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<sup>24</sup> <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/401565/pathway-driverless-cars-main.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/401565/pathway-driverless-cars-main.pdf)>.

<sup>25</sup> Para 16.4 ff.

<sup>26</sup> Para 7.48 ff (para numbers omitted).

16 The DfT concluded that there was ‘need to consider how liability would be decided if that vehicle is subsequently involved in a collision’<sup>27</sup> and that some actions were required in relation to regulations on electric personal vehicles and ‘remote control’ vehicles.<sup>28</sup> The target for making these amendments to domestic legislation is summer 2017.<sup>29</sup> The need for a review of the allocation of civil liability between driver and manufacturer and to amend the appropriate legislation was echoed in the DfT’s Summary Report and Action Plan.<sup>30</sup> In July 2015 the DfT issued a Code of Practice for the testing of automated vehicle technologies, which reads: ‘Failure to follow the Code may be relevant to liability in any legal proceedings. Similarly, compliance with the Code does not guarantee immunity from liability in such circumstances.’<sup>31</sup>

17 In other areas, there is much discussion and consensus that current product liability laws will need to be reviewed to ensure they are suitable for emerging technologies.<sup>32</sup>

## II. BASIC ELEMENTS OF LIABILITY

### A. OVERVIEW

18 A claimant seeking to rely upon the CPA will need to establish (as to the burden of proof, see no 71), subject to defences (see no 60 ff), that a defect (see no 27 ff) in a product or component thereof (see no 19 ff) caused (see no 55 ff) him damage (see no 47 ff). The regime under the CPA is strict (see no 41) with primary liability being channelled to the producer (see no 43 f). Provision is made for instances where the latter cannot be identified (no 45). The statutory scheme limits the categories of recoverable damages (see no 68 ff).

<sup>27</sup> Para 18.6.

<sup>28</sup> Para 18.8.

<sup>29</sup> Para 18.9.

<sup>30</sup> Para 18 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/401562/pathway-driverless-cars-summary.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/401562/pathway-driverless-cars-summary.pdf)>.

<sup>31</sup> Para 1.5 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/446316/pathway-driverless-cars.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/446316/pathway-driverless-cars.pdf)>. See also the work of the Automated Driving Insurer Group.

<sup>32</sup> See, for example, the discussion of nanotechnology liability in *Royal Society and Royal Academy of Engineering*, *Nanoscience and Nanotechnologies: Opportunities and Uncertainties* (2004), available here: <[www.nanotec.org.uk/finalReport.htm](http://www.nanotec.org.uk/finalReport.htm)>; and *Better Regulation Task Force*, *Scientific Research: Innovation with Controls* (2003). In a more specific context, see also *BB Chatterjee*, *Rethinking Alcock* in the New Media Age, *Journal of European Tort Law* (forthcoming), which focuses on psychiatric damage to secondary victims resulting from the communication of images through new technologies and media platforms.

## B. PRODUCT

19 As mentioned above (no 6), a ‘product’ is defined as goods or electricity and includes components and raw materials: sec 1(2)(c) CPA. The term ‘goods’ encompasses substances, growing crops and things comprised in land by virtue of being attached to it and any ship, aircraft or vehicle: sec 45(1). Section 2(4) on the restriction of the Act’s application to processed game and agricultural produce has been omitted so that the Act now applies to game and agricultural produce, processed or otherwise, in compliance with Directive 1999/34/EC. The use of the term ‘goods’ points in the direction of tangible assets. Thus, it would seem that intellectual property and digital content, of themselves, are not envisaged as falling within it. Similarly, ‘where software is supplied non-physically – for example, over the internet – it seems hard to escape the conclusion that no “product” is involved and hence there can be no liability [for the software producer].’<sup>33</sup> The physical media upon which digital content is recorded do, however, fall within the scope of the CPA. Moreover, it is thought that if ‘a malfunction or glitch in the software as written causes a machine to malfunction and injure the claimant there will be liability [for the software producer] under the 1987 Act.’<sup>34</sup> The basis of this conclusion is an analogy drawn with a case before the Court of Appeal in which it was stated *obiter* that a disk including the software encoded on it would be ‘goods’ for the purposes of the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982.<sup>35</sup>

20 The Directive does not extend to pure information, service or advice.<sup>36</sup> However, ‘any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product’ are relevant in determining whether a product as a whole is defective: sec 3(2)(a) (see no 28). Where such instructions are printed, it is the producer of the product and not the person undertaking the printing that is *prima facie* liable for errors which result in damage (assuming the latter did not introduce errors that were not in the material sent for printing).

21 Water and gas are expressly mentioned as goods under the Act and hence fall within its definition of ‘product’.<sup>37</sup>

<sup>33</sup> Clerk & Lindsell on Torts (21st edn 2014) para 11-51. See no 14 above (on software in driverless cars), however.

<sup>34</sup> Ibid para 11-51.

<sup>35</sup> *St Albans City and DC v International Computers Ltd* [1996] 4 All ER 481, 493 per Sir Iain Glidewell.

<sup>36</sup> Clerk & Lindsell on Torts (fn 33) para 11–49 f. Cf *St Albans City Council v ICL Ltd* [1996] 4 All ER 481, 493 where Sir Iain Glidewell thought a book containing dangerous misinformation was a defective good under sec 14 of the Sale of Goods Act 1979.

<sup>37</sup> Section 46(1).

22 In the case of *A v The National Blood Authority*, it was conceded that blood was a product within the meaning of the 1985 Directive.<sup>38</sup> Other bodily fluids (eg sperm) have been held to constitute ‘property’ within the meaning of sec 32(9)(c) of the Human Tissue Act 2004<sup>39</sup> and some have concluded that they are products.<sup>40</sup> Nevertheless, there are those who argue against such a conclusion.<sup>41</sup> The same applies for body parts.

23 As stated in sec 45(1) CPA, things attached to land may constitute ‘products’. However, sec 46(3) reads: ‘the performance of any contract by the erection of any building or structure on any land or by the carrying out of any other building works shall be treated for the purposes of this Act as a supply of goods insofar as, but only insofar as, it involves the provision of any goods to any person by means of their incorporation into the building, structure or works.’ In short, buildings and land fall outside the scope of the Act; construction materials (eg bricks and mortar) fall within it.<sup>42</sup> A further limitation is to be found in sec 46(4), which states that ‘references in this Act to supplying goods shall not include references to supplying goods comprised in land where the supply is effected by the creation or disposal of an interest in the land.’ Relief may, however, be available in the case of defectively constructed property under the Defective Premises Act 1972. In response to the Commission’s Green Paper on Liability for Defective Products, the UK stated that ‘construction activities are largely a service activity. We believe that liability for defective working practices (as opposed to the supply of defective products) is best considered under any separate initiative which the Commission may propose for defective services.’<sup>43</sup>

24 Where a component is incorporated into a movable, an action may be brought against the producer of the defective component or that of the final product. Where a defective component is incorporated into an immovable, the claim is against the producer of the component.<sup>44</sup>

25 Crafts and customised items are included within the meaning of ‘product’ but a maker of such products may bring himself within the defence under sec 4(1)(c), for example, where the product was not supplied in the course of a business with a view to profit.<sup>45</sup>

<sup>38</sup> [2001] 3 All ER 289, at [17] per Burton J.

<sup>39</sup> *Yearworth v North Bristol NHS Trust* [2010] QBD 1.

<sup>40</sup> For example, Clerk & Lindsell on Torts (fn 33) para 11-49; *G Howells*, *The Law of Product Liability* (2nd edn 2007) para 4.52.

<sup>41</sup> *Stapleton* (fn 15) 310.

<sup>42</sup> *Howells* (fn 40) para 4.41 f.

<sup>43</sup> United Kingdom response to the Commission’s Green Paper on Liability for Defective Products (fn 18) 6.

<sup>44</sup> *Howells* (fn 40) para 4.71.

<sup>45</sup> ‘Business’ includes a trade or profession and the activities of a professional or trade association or of a local authority or other public authority: sec 45(1) CPA.

26 The proportion of the value of materials and services, and the categorisation of the contract as a contract of sale or one of service, are quite irrelevant. The courts will look to substance rather than form. An aspect of 'service' comes with every product. Indeed, most suppliers, importers and own branders are doing no more than proving a service but the CPA nonetheless provides for their liability. The only question is whether there is a 'product' within the meaning of the CPA whose defect caused damage.

### C. DEFECT

27 It is for the claimant to 'establish on the balance of probabilities that there was a defect in the product'.<sup>46</sup> An inference that a particular product was defective may, however, be drawn under the appropriate facts.<sup>47</sup>

28 Section 3(1) CPA provides that: 'there is a defect in a product for the purposes of this Part *if the safety of the product is not such as persons generally are entitled to expect*'.<sup>48</sup> A 'legitimate expectations test' is thus central to the question of defectiveness under the CPA. A number of considerations are to be taken into account in determining whether a product is defective, as listed in sec 3(2). In particular: '(a) the manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product; (b) what might reasonably be expected to be done with or in relation to the product; and (c) the time when the product was supplied by its producer to another ...'.

29 While art 6 of the Directive, in defining 'defect', refers to 'taking all circumstances into account'<sup>49</sup> in conducting the legitimate expectations test, one judge has interpreted this to mean taking 'all *relevant* circumstances' into account,<sup>50</sup> with the consequence that some questions – namely, the avoidability of the harmful characteristic in relation to precautionary measures, the impracticality, cost or difficulty of taking such measures, and the benefit to society or utility of the product – would be considered irrelevant.<sup>51</sup> Some have argued that an exclusionary approach to risk/utility considerations goes

<sup>46</sup> *Foster v Biosil* (2001) 59 BMLR 178 per Booth QC.

<sup>47</sup> *Ide v ATB Sales Ltd* [2008] EWCA Civ 424, [2009] RTR 85.

<sup>48</sup> Emphasis added. 'Safety', in relation to a product, includes safety with respect to products comprised in that product and safety in the context of risks of damage to property, as well as in the context of risks of death or personal injury: sec 3(1) CPA.

<sup>49</sup> See also sec 3(2) CPA 1987 which states that 'all the circumstances shall be taken into account' in determining whether there was a defect in a product.

<sup>50</sup> *A v The National Blood Authority* [2001] 3 All ER 289, at [57] per Burton J.

<sup>51</sup> *A v The National Blood Authority* [2001] 3 All ER 289, at [68] per Burton J.

too far<sup>52</sup> and is indeed inconsistent with other authorities. In *B (A Child) v McDonald's Restaurants Ltd*,<sup>53</sup> for example, utility was a factor which led the court to conclude that the products – hot drinks – were not defective. Similarly, avoidability was also a relevant consideration in finding the product in question defective in *Abouzaid v Mothercare (UK) Ltd*.<sup>54</sup>

30 In determining the issue of defectiveness, a distinction is drawn between standard and non-standard products. The former are products which perform as the producer intends and the latter are specific specimens which are deficient or inferior in terms of safety to other products of the same or a similar series.<sup>55</sup> It is the harmful characteristic in the non-standard product that causes the injury or damage.<sup>56</sup> Non-standard products are not to be considered as automatically defective but it may be easier to prove defectiveness if the product in question differs from the standard product.<sup>57</sup>

31 Note also that the mere fact that a product is inherently dangerous – eg poison – does not necessarily mean that it is defective, ‘provided that the injury resulted from that known danger.’<sup>58</sup> In such a case, ‘there may not need to be any further consideration ... of whether it was safe and the level of safety to be legitimately expected.’<sup>59</sup>

32 The distinction between standard and non-standard products is thought to ‘serve broadly the same purpose as that which is sometimes made between design defects and manufacturing defects’.<sup>60</sup> However, the CPA itself does not draw such a distinction and in at least one case a judge has ruled that ‘there are no such boxes or categories in the Directive, unlike the Third Restatement.’<sup>61</sup> Though criticised, there is a ruling to the effect that design standards are not the relevant benchmark since members of the public as a whole are unlikely to know what safety standard the product they are buying has been designed to.<sup>62</sup> In particular, Howells, a leading academic commentator, writes that the approach taken in the case in question was weak insofar as the consumer expectation test focused on ‘the “actual” expectations of consumers rather than the legal

<sup>52</sup> *Lunney/Oliphant* (fn 20) 586 f.

<sup>53</sup> [2002] EWHC 490.

<sup>54</sup> Times, 20 February 2001.

<sup>55</sup> The equivalent of ‘rogue products’ or ‘lemons’ in the US or ‘Ausreisser’ or ‘off the road’ products in Germany.

<sup>56</sup> *A v The National Blood Authority* [2001] 3 All ER 289, at [36] per Burton J.

<sup>57</sup> *A v The National Blood Authority* [2001] 3 All ER 289, at [38] per Burton J.

<sup>58</sup> *A v The National Blood Authority* [2001] 3 All ER 289, at [35] per Burton J.

<sup>59</sup> *A v The National Blood Authority* [2001] 3 All ER 289, at [35] per Burton J.

<sup>60</sup> See *Lunney/Oliphant* (fn 20) 588.

<sup>61</sup> *A v The National Blood Authority* [2001] 3 All ER 289, at [39] per Burton J.

<sup>62</sup> *Pollard v Tesco Stores Ltd* [2006] EWCA CIV 393, at [17] per Laws LJ.

test that requires consideration of what the persons generally are “entitled” to expect.<sup>63</sup>

33 As to defects to digital content and misleading information, see no 19 above. As regards electricity (which by virtue of sec 1(2) is a product under the CPA), it is thought that surges in current may constitute a ‘defect’.<sup>64</sup>

34 As the standard is that expected by members of the public as a whole at any given time, it may well be that what such members consider safe today will not be so considered tomorrow and *vice versa*.

## D. MARKETING OF PRODUCT

35 The CPA does not use the Directive’s phrase ‘put into circulation’<sup>65</sup> but instead employs the term ‘supply’. This has been held to mean when a product enters a marketing process in the form in which it is offered to the public in order to be used or consumed.<sup>66</sup>

36 The manner in which the product was marketed is closely intertwined with the question of defectiveness.

37 If a defect ‘did not exist in the product at the relevant time’, this could serve as a valid defence under sec 4(1)(d) CPA (see no 63). Generally, the relevant time is the time the product, other than electricity,<sup>67</sup> is supplied to another: sec 4(2). If the defect arose before, liability may attach. As is implicit in sec 3(2)(b), foreseeable misuse or mishandling is a relevant consideration and this may well extend to improper storage or handling. But where a product is supplied with appropriate instructions for its use, the producer should not generally be expected to cater for users who throw them away or lose them.<sup>68</sup>

## E. PRODUCER’S OBLIGATIONS

38 Though Part I of the CPA does not itself use the language of ‘duty’, it may be said that producers owe a strict duty to consumers and others to ensure that

<sup>63</sup> Howells (fn 40) para 4.151.

<sup>64</sup> Clerk & Lindsell on Torts (fn 33) para 11-49, fn 221.

<sup>65</sup> See arts 6 and 7 of the Directive.

<sup>66</sup> See Case 127/04, *O’Byrne v Sanofi Pasteur MSD Ltd* [2006] 1 WLR 1606, 1620 f as referred to in *O’Byrne v Aventis Pasteur MSD Ltd* [2010] 1 WLR 1412, 1420 f per Lord Rodger.

<sup>67</sup> In relation to electricity, it means the time at which it was generated, being a time before it was transmitted or distributed: sec 4(2) CPA.

<sup>68</sup> *Worsley v Tambrands Ltd* [2000] PIQR P95.



their products are not defective. The duty is implicit in the definition of ‘defect’ contained in sec 3 of the Act and shaped by the defences set out in sec 4.<sup>69</sup> More concrete statements as to the obligations of a producer are provided by safety regulations issued by the Secretary of State under Part II of the 1987 Act, especially the General Product Safety Regulations 2005 (see nos 79 ff and 83 ff), though these are not decisive in determining liability issues under Part I.

## F. SPECIAL PRODUCTS

39 Products which could result in congenital disabilities are given specific treatment under the CPA. Section 1 of the Congenital Disabilities (Civil Liability) Act 1976 provides that a person responsible for an occurrence affecting the parent of a child, which causes the child to be born disabled, will be liable to the child if he would have been liable in tort to the affected parent. The child’s claim is thus derivative and distinct from that of the parent. The Act does not apply where either or both of the parents knew the risk of their child being born disabled.<sup>70</sup>

40 Section 6(3) of the CPA deals with how the 1976 Act is to be given effect in relation to product liability. It provides, so far as is material, that a child born disabled has the right to pursue the tortfeasor under the CPA where it was a defective product that caused the ante-natal injury.<sup>71</sup> Unlike under sec 1(6) of the Congenital Disabilities (Civil Liability) Act 1976, which permits a parent to exclude or limit the tortfeasor’s liability towards the child, any purported exclusion or limitation of liability is void as a result of secs 6(3)(c) and 7 CPA. See also no 67.

## G. STANDARD OF LIABILITY

41 The CPA may be considered to establish a strict liability regime (ie one which requires no proof of fault on the defendant’s part). Claims under the CPA are therefore not claims in negligence. Nevertheless, the liability ‘is to be treated as liability in tort’.<sup>72</sup> The wrong is complete where the elements specified in the statute are established. Liability under the CPA is not absolute, in the sense of not admitting defences (no 60 ff).

<sup>69</sup> *S Deakin/A Johnston/B Markesinis*, Markesinis and Deakin’s Tort Law (7th edn 2012) 615.

<sup>70</sup> Section 1(4) (subject to exception).

<sup>71</sup> For an example of such a claim, see *Multiple Claimants v Sanofi-Synthelabo Ltd* [2007] EWHC 1860.

<sup>72</sup> Section 6(7) CPA.

42 Interpretation of the statutory requirements may be influenced by views as to the strictness of the liability introduced. Thus, because liability under the Directive is defect- as opposed to fault-based, Burton J in *A v The National Blood Authority* concluded that this tacitly countermanded the express wording of art 6, requiring consideration of *all circumstances* in assessing defectiveness, as this would open the door to a risk/utility analysis typical of negligence.<sup>73</sup> As noted above (no 29), the reasoning has been criticised and Burton J may be thought to have gone too far in precluding any balancing at all of risk with utility.<sup>74</sup>

### III. THE PERSON LIABLE FOR THE DAMAGE

43 Section 2(2) and (3) CPA deals with the persons who may be liable. While primary liability attaches to the producer of the product, any person who puts his name, trade mark or other distinguishing mark on the product, the first commercial importer of the product into the EU for the purpose of supply or a supplier may also be liable. Public authorities are not excluded from the purview of the Act.<sup>75</sup>

44 A ‘producer’ is defined under sec 1(2)(a) as the person who manufactured a product. This covers both a product component and a finished product. In the case of a substance which has not been manufactured but has been won or abstracted, it is the person who won or abstracted it. Where a product does not fit within those categories but essential characteristics are attributable to an industrial or other process, it is the person who carried out that process.

45 Under sec 2(3), a supplier is only liable if the person who suffered the damage requests him to identify the producer, own brander or importer and he fails to do so within a reasonable period of time. What constitutes a ‘reasonable period of time’ is left to the courts to determine. By virtue of sec 1(3) a person who supplies any product in which products are comprised is not treated by reason only of his supply of that product as supplying any of the products so comprised. The effect of this provision is that a supplier need only identify a producer of the entire product and not the producer of a specific defective part. There is a defence for those who supply products otherwise than in the course of business and who do so otherwise than with a view to profit: sec 4(1)(c), see no 62.

46 As arts 5 and 8 of the Directive state, the Directive applies without prejudice to the provisions of national law concerning the right of contribution

<sup>73</sup> *A v The National Blood Authority* [2001] 3 All ER 289, at [57]–[63].

<sup>74</sup> See *Lunney/Oliphant* (fn 20) 586 f.

<sup>75</sup> Section 9 CPA (referring specifically to the Crown). See also *A v The National Blood Authority* [2001] 3 All ER 289, at [42] per Burton J. Nor are non-profit making organisations.

or recourse. Under the CPA, where two or more persons are liable for the same damage, their liability is joint and several: sec 2(5). By sec 1(1) of the Civil Liability (Contribution) Act 1978, ‘any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).’ The amount of the contribution recoverable from any person is as may be found by the court to be just and equitable having regard to the extent of that person’s responsibility for the damage in question: sec 2(1) of the same Act.

#### IV. THE AGGRIEVED PERSON AND DAMAGE

47 There is little guidance on who can bring an action under the Act. Presumably, any person who suffers personal injury or any loss of or damage to any property (including land)<sup>76</sup> as a result of a product defect, or the personal representatives of a person who dies, can do so. Section 5(5) CPA does, however, specifically mention that only a ‘person with an interest in ... property’ can pursue an action for loss of or damage to property caused by a defective product.

48 In parallel with art 9 of the 1985 Directive, the concept of actionable damage is limited in a number of respect under the 1987 Act. First, while damage consequential upon personal injury and the other losses discussed above is actionable, pure economic loss is not because it does not fit into the categories of damage giving rise to liability specified in sec 5 CPA. This is in line with the general exclusionary rule applied in negligence actions but exceptions exist even there. The CPA admits no such exceptions. Pure economic loss is, of course, readily recoverable in contract.

49 Second, ‘damage to the product itself or ... the loss of or any damage to the whole or any part of any product which has been supplied with the product in question comprised in it’<sup>77</sup> is also excluded. Again, this maps onto the normal approach taken in negligence,<sup>78</sup> though exceptions are sometimes suggested – for example, in the case of component parts of ‘complex structures’.<sup>79</sup> The Act does not seem to allow any exception of that nature.

50 Third, loss of or damage to property does not extend to property which, at the time it is lost or damaged, was not ordinarily intended for private use, occupation or consumption *and* was not intended by the person suffering the

<sup>76</sup> Section 5(1).

<sup>77</sup> Section 5(2).

<sup>78</sup> *D & F Estates Ltd v Church Commissioners* [1989] AC 177.

<sup>79</sup> *Ibid*, per Lord Bridge.

loss or damage mainly for his own private use, occupation or consumption: sec 5(3).<sup>80</sup> Domestic tort actions do not segregate business from non-business use of goods or other property although some torts specifically refer to harm to business interests (eg malicious falsehood), and others (eg the economic torts) are more likely to arise in a commercial context. In contract, the terms are agreed upon by the parties and there is no categorical bar to their agreeing to exclude liability for particular forms of damage. However, there are legislative controls on what can and cannot be agreed in consumer contracts, including the exclusion of liability.<sup>81</sup>

51 Finally, a threshold of £275 applies insofar as loss of or damage to property is concerned: sec 5(4). This reflects the policy expressed in the recital to the Directive: ‘to avoid litigation in an excessive number of cases’. As the CPA applies without prejudice to any liability arising otherwise (sec 2(6) CPA), an action in negligence may still be maintained for any loss or damage excluded as a result of the application of the threshold. However, the onus of adducing evidence on fault falls on the claimant. The UK Government has revealed that it does not intend to modify the threshold, which it considers to be reasonably modest and does not unduly disadvantage consumers. It points out that, in most cases, the damage would in any case be covered by the consumer’s home insurance policy.<sup>82</sup> Though a *de minimis* threshold applies generally to the compensation of damage under domestic law,<sup>83</sup> the adoption of a pecuniary threshold is unusual.

52 Under domestic tort law, the type (but not the extent) of the damage must normally have been reasonably foreseeable.<sup>84</sup> This rule of remoteness appears also to apply to claims under the CPA. In contract, a very substantial degree of probability is required.<sup>85</sup>

53 The issue of loss of a chance was specifically raised in *A v The National Blood Authority*.<sup>86</sup> The defendants argued that they were not liable for all the consequences of the claimants’ blood infection but only for that damage which resulted from the failure to introduce surrogate testing and/or to implement routine screening earlier. However, Burton J refused to reduce the claimants’

<sup>80</sup> See sec 5(5) ff.

<sup>81</sup> See especially Consumer Rights Act 2015, Part 2 (Unfair Terms).

<sup>82</sup> United Kingdom response to the Commission’s Green Paper on Liability for Defective Products (fn 18) 4.

<sup>83</sup> *K Oliphant*, Basic Questions on Tort Law from the Perspective of England and the Commonwealth, in: H Koziol, Basic Questions on Tort Law from a Comparative Perspective (2015) no 5/119. But note that some torts (eg trespass in its various forms) are actionable without proof of any damage at all.

<sup>84</sup> *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd* [1961] AC 388.

<sup>85</sup> *Koufos v C Zarnikow Ltd, The Heron II* [1969] 1 AC 350.

<sup>86</sup> [2001] 3 All ER 289, at [176] ff per Burton.

damages by reference to any loss of chance argument. The judge found it unnecessary to address the contention of counsel for the claimants that the CPA does not allow claims for loss of a chance because they are claims for pure economic loss, which is not damage for which liability can arise under sec 5(1) CPA, or counsel's further submission, referring to *Hotson v East Berkshire Health Authority*,<sup>87</sup> that the issue in personal injury cases is simply one of causation, and thus results in either total success or total failure.<sup>88</sup>

54 As indicated in no 08, the UK legislature did not exercise the option of capping the defendant's potential liability.

## V. CAUSALITY

55 Section 2(1) CPA imposes liability 'where any damage is *caused* wholly or partly by a defect in a product' (emphasis added). It is 'unnecessary to ascertain the cause of the defect'.<sup>89</sup> It is, however, for the claimant to prove on a balance of probabilities that a defect had caused the damage sustained.

56 The theory of proportional liability under the CPA is yet to be ruled upon by the English courts.<sup>90</sup> But in answering the question in the Commission's Green Paper on Liability for Defective Products whether 'market share liability' would be feasible for cases in which there are several producers of the same product and it is not possible to identify the producer of the product in question, the UK argued that such a concept was superfluous since, if the producer cannot be identified, the liability falls on the supplier. It also warned that the introduction of market share liability 'would have far reaching consequences for producers and might discourage record keeping for traceability purposes'.<sup>91</sup> The cognate issue of loss of a chance has already been broached in no 53 and, as it is best regarded as relating to the definition of damage rather than causation, is not pursued further here.

57 All relevant circumstances can be taken into consideration in determining the cause of the damage. Domestic rules on causation apply. English law proceeds on the basis of both factual and legal causation. Factual causation is

<sup>87</sup> [1987] AC 750.

<sup>88</sup> As to why this is the case, see McGregor on Damages (19th edn 2014) Chapter 10.

<sup>89</sup> *Ide v ATB Sales Ltd* [2008] EWCA Civ 424, at [19] per Thomas LJ.

<sup>90</sup> On proportional liability in English law see *K Oliphant*, Causal Uncertainty and Proportional Liability in England and Wales, in: I Gilead/MD Green/BA Koch (eds), *Proportional Liability: Analytical and Comparative Perspectives* (2013).

<sup>91</sup> United Kingdom response to the Commission's Green Paper on Liability for Defective Products (fn 18) 3.

generally approached under the ‘but for’ test, though there are exceptions. Where there are two or more acts or events which would each be sufficient to bring about the claimant’s injury but the claimant is unable to prove which act or event in fact caused the loss (ie *multiple concurrent or alternative causes*), a broader view of causation may be taken on grounds of fairness and reasonableness. In such cases, it is sufficient to show that the defendant’s conduct ‘materially contributed’ to the claimant’s injury<sup>92</sup> or to the risk of the same.<sup>93</sup> In the case of *overtaken causes* – that is, where a claimant is injured by a defendant’s negligence but prior to trial suffers similar loss as a result of an independent supervening event – the initial injury may still be considered the cause of the damage and damages will be awarded against the initial defendant where the supervening event was tortious; otherwise the supervening event is treated as a risk within the claimant’s sphere and curtails the defendant’s liability.<sup>94</sup> Where the successive event is hypothetical rather than actual, a reduction of damages will ensue.<sup>95</sup>

58 As regards legal causation, a *voluntary intervening act of a third party* breaks the chain of causation unless the defendant was under an exceptional duty to protect against third-party interference.<sup>96</sup> No hard and fast rules can be laid down as to lawful or negligent intervening acts of a third party.<sup>97</sup> As regards an *involuntary intervening act of a third party*, the starting point is to ask whether the intervention was reasonably foreseeable. If it was, liability is likely to stick. In the case of *intervening events*, the position is that ‘[w]here the event is dependent upon the defendant’s act in the sense that it would not have occurred had the defendant not acted as he did, the defendant will be liable for all the damage.’<sup>98</sup>

59 Where the aggrieved party contributes to the damage in question, recourse may be had to the Law Reform (Contributory Negligence) Act 1945: see sec 6(4) CPA. Similar rules of thumb as are stated above in respect of intervening acts of a third party apply to *intervening acts by the claimant*. A claimant cannot be found to have been 100% contributorily negligent.<sup>99</sup> In exceptional circumstances, however, the (full) defence of *volenti non fit iniuria* may apply.<sup>100</sup>

<sup>92</sup> *Bonnington Castings Ltd v Wardlaw* [1956] AC 613.

<sup>93</sup> *McGhee v National Coal Board* [1973] 1 WLR 1; *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32.

<sup>94</sup> *Baker v Willoughby* [1970] AC 467; *Jobling v Associated Dairies* [1982] AC 794.

<sup>95</sup> *Heil v Rankin* [2001] QB 272. See McGregor (fn 88) para 6-040.

<sup>96</sup> See *Lamb v Camden LBC* [1981] 2 All ER 408.

<sup>97</sup> McGregor (fn 88) paras 6-040 and 6-046.

<sup>98</sup> *Ibid* para 6-072.

<sup>99</sup> *Pitts v Hunt* [1990] All ER 344.

<sup>100</sup> See, in a different context, *Morris v Murray* [1991] 2 QB 6.

## VI. DEFENCES AND EXCLUSIONS

60 Section 4 CPA implements the defences specified in art 7 of the Directive. Under sec 4(1)(a) it is a defence if the ‘defect is attributable to compliance with any requirement imposed by or under any enactment’ or with any EU obligation. In practice, most legislation tends to set minimum standards whereas the defence only applies in respect of mandatory obligations.<sup>101</sup> Insofar as domestic legislation goes, the provision applies to ‘enactments’; consequently, voluntary standards set by bodies governing particular industries do not count.<sup>102</sup>

61 By sec 4(1)(b), it is a defence if ‘the person proceeded against did not at any time supply the product to another’. The rule seeks to protect producers in such circumstances as ‘where accidents occur before distribution or where products are stolen and supplied through irregular channels.’<sup>103</sup>

62 Section 4(1)(c) applies where the defendant’s supply of products was neither in the course of a business nor with a view to profit (see also no 45). In *Henning Veddfald v Århus Amtskommune*, the European Court of Justice (ECJ) made it clear that the equivalent provision in the Directive (art 7(c)) does not exclude a defective product which is manufactured and used in the course of providing a specific medical service, financed entirely from public funds, for which the injured patient is not required to pay any contribution. The fact that a product is manufactured for a specific medical service that is financed from public funds maintained out of taxpayers’ contributions cannot detract from the economic and business character of that manufacture.<sup>104</sup>

63 We have already considered the exculpatory ground under sec 4(1)(d) (see no 37). The defence seeks to exclude liability where ‘the defect did not exist in the product at the relevant time’<sup>105</sup> and is quite broad in its application. *Piper v JRI (Manufacturing) Ltd* concerned an allegedly defective prosthesis that was implanted into the claimant’s right hip.<sup>106</sup> It was held there that it was sufficient to show that the manufacturing and inspection process was such that any imperfections would have been identified before the final inspection process. On the facts, the court inferred that the defect would have been detected had it been present prior to delivery at the hospital, a decision upheld on appeal. The efficacy of this defence is further illustrated by the recent case of *Love v Halfords*

<sup>101</sup> *Howells* (fn 40) para 4.252.

<sup>102</sup> *Ibid* para 4.252.

<sup>103</sup> *Ibid* para 4.256.

<sup>104</sup> Case C-203/99, [2001] ECR I-3569, at [19] ff.

<sup>105</sup> See no 37 on the meaning of the relevant time.

<sup>106</sup> [2006] EWCA Civ 1344.

*Ltd.*<sup>107</sup> The claimant there alleged that his bicycle's steerer tube was defective and thus caused him to lose control and fall, sustaining very serious injuries. In connection with the sec 4(1)(d), the evidential burden fell upon the defendant to show that there was no defect in the steerer tube at the point of sale but was discharged on the facts: as a matter of reasonable inference from the scientific evidence, there was nothing defective about the steerer tube, its design, assembly or the steel from which it was made.<sup>108</sup> Rather, the evidence was that 'some accident in the nature of a collision, or aggressive jumping or similar riding on the bike involving the placing of excessive bending force on the tube took place and there was a botched attempt to repair it which made it worse.'<sup>109</sup>

64 Sec 4(1)(e) enacts the development risk defence. A person is not liable if 'the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control'. The inclusion of the above defence is said to be justified by a number of considerations, 'such as encouragement of technological innovation, keeping down insurance costs, preserving a competitive advantage and (no doubt) to protect the pharmaceutical industry.'<sup>110</sup> Whether sec 4(1)(e) accords to its corresponding provision in the Directive was the question in *Commission v United Kingdom*. Advocate General Tesauro elucidated in his Opinion in the case, and the ECJ agreed, that the defence refers solely to 'scientific and technical knowledge', not safety standards in use in the industry, at the time the product was put into circulation.<sup>111</sup> The Court further ruled that the defence does not contemplate the state of knowledge of which the producer in question was actually or subjectively in or could have been apprised. Rather, the test is objective: the state of scientific and technical knowledge, including *the most advanced level of such knowledge* at the time the product was put into circulation, of which the producer is presumed to have been informed. Only serious or scientific opinions are relevant. The Court went on to add that the relevant scientific and technical knowledge must have been accessible at the time when the product was put into circulation. To illustrate the requirement of accessibility, the Advocate General gave the example of research carried out by an academic in Manchuria published in a local scientific journal in Chinese as knowledge which would not be accessible because the information does not circulate outside the boundaries of the region. In *A v The National Blood Authority*, Burton J thought that 'the right approach is to look at "accessibility" and to regard as Manchuria perhaps an unpublished document or unpublished research not available to

<sup>107</sup> [2014] EWHC 1057, [2014] RTR 470.

<sup>108</sup> [2014] EWHC 1057, at [50] per Sir Colin Mackay.

<sup>109</sup> [2014] EWHC 1057, at [49] per Sir Colin Mackay.

<sup>110</sup> Clerk & Lindsell on Torts (fn 33) para 11-71.

<sup>111</sup> Case C-300/95 [1997] ECR I-2649, at [26] ff.



the general public, retained within the laboratory or research department of a particular company.<sup>112</sup> In that case, the claimants had argued that, once the defect in blood is known, it is a known risk and a known risk does not qualify under the defence even if it is unavoidable. Burton J agreed but added that if the risk is one within the legitimate expectations of the public at large it might bear on the separate issue of whether the product was defective.<sup>113</sup> On the facts, the defence was found not to be applicable and the defendant's liability stuck.

65 Finally, it is a defence under sec 4(1)(f) if the defect constituted a defect in a subsequent product in which the original product was comprised and the defect was wholly attributable to the design of the subsequent product or to compliance by the producer of the product in question with instructions given by the producer of the subsequent product.

66 It is for the defendant to prove his case when relying upon the above defences, hence the reference to 'for him to show' in sec 4(1) of the CPA. This can also be inferred from the recital of Directive 85/374/EEC, which reads: 'a fair apportionment of risk between the injured person and the producer implies that the producer should be able to free himself from liability *if he furnishes proof* as the existence of certain exonerating circumstances'.<sup>114</sup>

67 Section 7 CPA prohibits the exclusion or restriction of liability.<sup>115</sup> Any term or notice purporting to have such effect would thus be invalid.

## VII. REMEDIES

68 Damages are available for damage to the interests specified in no 47 ff above. English courts do not allow the reduction of the claimant's award by reference to the defendant's economic position or on other equitable grounds. It is very unlikely that punitive or exemplary damages could be awarded under the CPA, given the 1985 Directive's foundation on the need to approximate national laws.<sup>116</sup> Such a conclusion is also consistent with the lack of express

<sup>112</sup> [2001] 3 All ER 289, at [49].

<sup>113</sup> For criticisms of this aspect of the decision see *Lunney/Oliphant* (fn 20) 594 f.

<sup>114</sup> Emphasis added. See also *Love v Halfords Ltd* [2014] EWHC 1057, at [25] f per Sir Colin Mackay.

<sup>115</sup> 'The liability of a person by virtue of this Part to a person who has suffered damage caused wholly or partly by a defect in a product, or to a dependant or relative of such a person, shall not be limited or excluded by any contract term, by any notice or by any other provision.'

<sup>116</sup> On the availability of such damages in England and in Continental Europe generally, see *H Koziol/V Wilcox*, *Punitive Damages: Common Law and Civil Law Perspectives* (2009). See also Clerk & Lindsell on Torts (fn 33) para 11-84.

mention of the availability of such damages in the CPA and the non-availability of exemplary (and indeed aggravated) damages in the tort of negligence.<sup>117</sup>

69 An action lies under the Fatal Accidents Act 1976 in the case of death. Bereavement damages are available to a fixed category of eligible persons (including the spouse of the deceased).<sup>118</sup> A fixed statutory sum, currently set at £12,980, is paid.<sup>119</sup> Any damage for which a person is liable under sec 2 of the CPA is deemed to have been caused, for the purposes of the 1976 Act, by that person's wrongful act, neglect or default: sec 6(1)(a) CPA. See no 71.

70 It is not possible to seek an injunction in respect of a defective product under the CPA. The UK Government has said that it 'do[es] not see a case for extending the right of a consumer to seek an injunction if injured by a defective product. We feel this goes beyond the aims of the Directive. And furthermore, such a change would fundamentally alter the present safety regime for products. It is not clear what benefit this would have for consumers or businesses.'<sup>120</sup> The UK Government also has no plans to introduce a special compensation scheme for the victims of defective products in cases where the development risks defence applies and has noted that it would 'be difficult to assess the likely demand on such a fund.'<sup>121</sup>

## VIII. PROCEDURAL AND EVIDENTIAL ISSUES

71 Although not expressly stated under the CPA, a claimant is required to prove certain aspects of his case (including the existence of a defect, causation and damage: see nos 27 ff, 55 ff and 47 ff respectively) as is a defendant as regards the available defences (see no 60 ff). As in all civil proceedings, the standard of proof is the balance of probabilities (see nos 27 and 55). In applying this standard, the court may be prepared to work on the basis of inferences, as mentioned under nos 27 and 63 above.

72 Schedule 1 CPA amended the Limitation Act 1980 in its application in relation to the bringing of actions under Part I CPA. In the case of defective products, the relevant period is three years from the date on which the cause of action accrued and the date of knowledge of the injured person or, in the

<sup>117</sup> *Kralj v McGrath* [1986] 1 All ER 54 (aggravated damages); *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29 [2002] 2 AC 122, at [122] per Lord Scott (exemplary damages).

<sup>118</sup> Section 1A(2). See proposed changes under the Negligence and Damages Bill 2015–16.

<sup>119</sup> Section 1A(3).

<sup>120</sup> United Kingdom response to the Commission's Green Paper on Liability for Defective Products (fn 18) 7.

<sup>121</sup> *Ibid* 4.

case of loss of or damage to property, the date of knowledge of the plaintiff or (if earlier) of any person in whom his cause of action was previously vested, whichever is the later.<sup>122</sup> In the case of death the period is three years from the date of death or the date of the personal representative's knowledge, whichever is the later.<sup>123</sup> There is a long-stop period of ten years from the relevant time (as to which see no 37).<sup>124</sup> In response to the question in the Commission's Green Paper of whether the latter period would benefit from modification, the UK Government stated that sympathy lay with those who advocate increasing the period of liability as some injuries (such as BSE) have long incubation periods and may appear later than ten years after the product was supplied; however, it felt that doubling the period, for example, would add significantly to business costs and would bear particularly heavily on smaller enterprises. It was also concerned about the practicability of deciding to which sectors to apply longer time limits. Finally, it added that such an added layer of complexity would not be in the interests of business or consumers.<sup>125</sup>

## IX. ALTERNATIVE REGULATIONS AND REMEDIES

### A. CONSEQUENCES OF PURSUING DOMESTIC REMEDIES

73 As mentioned in no 10, an action in contract and tort may be brought alongside or instead of one under the CPA, provided only that the claimant does not recover damages several times over. A claimant will be advised as to which course to pursue in light of the precise circumstances of his case.

74 Strict liability is the default rule in contract unless the contract imposes a fault standard (so that a contractual duty of care arises). The alternative action in tort will generally be in respect of negligence, which as its name suggests requires fault. It is noteworthy that English courts have generally refused to rely on the doctrine of *res ipsa loquitur* in domestic product liability cases to infer negligence from the very nature of an accident or injury (cf no 27).<sup>126</sup> However, in *Grant v Australian Knitting Mills Ltd*, a case in which a claimant who contracted dermatitis alleged that this was the result of wearing a woollen garment in which

<sup>122</sup> Limitation Act 1980, sec 11A(4). 'Personal injuries' includes any disease and any impairment of a person's physical or mental condition, and 'injury' and cognate expressions shall be construed accordingly: sec 38(1) Limitation Act 1980.

<sup>123</sup> Limitation Act 1980, sec 11A(5).

<sup>124</sup> Limitation Act 1980, sec 11A(3).

<sup>125</sup> United Kingdom response to the Commission's Green Paper on Liability for Defective Products (fn 18) 5.

<sup>126</sup> *Mason v Williams & Williams Ltd* [1955] 1 WLR 549, 551 f per Finnmere J. See also *Evans v Triplex Safety Glass Co Ltd* [1936] 1 All ER 283.

excess sulphites were found, the Privy Council ruled that: ‘If excess sulphites were left in the garment, that could only be because some one was at fault ... Negligence is found *as a matter of inference* from the existence of the defects taken in connection with all the known circumstances: even if the manufacturers could by apt evidence have rebutted that inference they have not done so.’<sup>127</sup> In effect, therefore, the same outcome is reached as if *res ipsa loquitur* had been applied. A more concrete advantage in pursuing one’s claim in negligence (or in contract) is that such actions are not limited to products but rather they can extend, *inter alia*, to services – for example, damage arising from hire-purchase agreements or from those who conduct repair or installation work (see also the liability for misstatements in no 76).<sup>128</sup> This is not the case under the CPA (see no 20 above). Also, unlike the CPA which is effectively limited to protecting consumers, most actions in contract and tort extend to business claimants.

75 The difficulty arising from the doctrine of privity of contract is somewhat alleviated by the Contracts (Rights of Third Parties) Act 1999, which entitles third parties to enforce a term of a contract if the contract expressly provides that they may or if the term purports to confer a benefit on them. This is no help to a bystander, however (cf an action in tort). Moreover, where goods are sold via a distribution chain, liability is *prima facie* limited to the immediate contracting party and does not automatically extend to the manufacturer. While the seller will invariably have a contract with the supplier and he with his supplier until the contractual chain reaches back to the manufacturer, suing along a contractual chain is not altogether efficient. Moreover, a difficulty arises where one party in the chain has ceased to trade for whatever reason or is uninsured, out of the jurisdiction or can benefit from an exclusion clause.<sup>129</sup> Admittedly, certain warranties are implied into contracts for sale in the course of business (see no 03) including correspondence with quality or fitness and sample supplied.<sup>130</sup> Yet this is not the case where (for example) a fault was specifically drawn to the buyer’s attention before the contract was made and/or would have been apparent on a reasonable examination in the case of a sale by sample.<sup>131</sup> Nonetheless, the

<sup>127</sup> [1936] AC 85, 101 per Lord Wright (emphasis added).

<sup>128</sup> Markesinis and Deakin’s Tort Law (fn 69) 610.

<sup>129</sup> Ibid 608.

<sup>130</sup> See sec 14 f of the Sale of Goods Act 1979; sec 10 f of the Supply of Goods (Implied Terms) Act 1973; secs 4 f and 9 f of the Supply of Goods and Services Act 1985. In the case of consumers see, among others, secs 9 f and 13 of the Consumer Rights Act 2015.

<sup>131</sup> On implied terms about quality or fitness see, for example, sec 14(2C)(a) of the Sale of Goods Act 1979; sec 10(2C)(a) of the Supply of Goods (Implied Terms) Act 1973 and secs 4(3)(c) and 9(3)(c) of the Supply of Goods and Services Act 1985. In the case of sale by sample see secs 14(2C)(c) and 15(2)(c) of the Sale of Goods Act 1979; secs 10(2C)(c) and 11(1)(c) of the Supply of Goods (Implied Terms) Act 1973 and secs 4(3)(c), 5(2)(c), 9(3)(c) and 10(2)(c) of the Supply of Goods and Services Act 1982. In the case of consumers see, among others, sec 9(4)(a) of the Consumer Rights Act 2015 on satisfactory quality and secs 9(4)(a) and 13(2) on sale by sample.

effect of implied terms is that a purchaser is protected in contract even if the goods were not ‘unsafe’ and thus caused no damage but were merely shoddy. Purchasers also benefit from a statutory presumption that goods which do not conform to the contract of sale within a period of six months from the date of delivery are taken not to have conformed to it on that day.<sup>132</sup>

76 Should one choose to seek redress in the form of an action for breach of contract or tort, one ‘lets in all the consequences of that form of action.’<sup>133</sup> The aim of contractual damages is to put the non-breaching party in the position he would have occupied had the contract been fulfilled, while that in tort is the restoration of the *status quo ante* (more exactly: putting the victim in the position he would have been in had the tort not occurred). An advantageous consequence in both cases is the availability of damages for pure economic loss (cf CPA, no 48). In tort, however, such losses are mostly restricted to cases where one can establish a relationship of proximity through an assumption of responsibility by the defendant to the claimant. A ‘defective’ or negligently made statement may fall within the so-called *Hedley Byrne* exception, thus entitling a successful claimant to such damages.<sup>134</sup> Damage to the product itself is also recoverable in contract and (perhaps) in tort. Exemplary and aggravated damages can be pursued under (some) torts. A greater number of defences also exist, for example exclusion of liability in tort and duress and frustration in contract.

77 One who frames his action in contract can seek to rely upon general contractual remedies such as rescission and specific performance. Moreover, certain statutory remedies serve to benefit consumers: by sec 24 of the Consumer Protection Act 2015, for example, a right to require the seller to repair or replace the problematic goods or to require him to reduce the purchase price is implied.

78 In addition, restitutionary remedies may be sought as a basis for redress in contract and tort, though this option is not often available and is seldom pursued. An injunction can also be sought in contract but not in tort claims based on negligence.

<sup>132</sup> See Consumer Rights Act 2015, sec 19(14). The provision does not apply if it is established that the goods did so conform to the contract on that day or its application is incompatible with the nature of the goods or with how they fail to conform to the contract.

<sup>133</sup> *Addis v Gramophone Co Ltd* [1909] AC 488, 496 per Lord Atkinson.

<sup>134</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. See also liability under the Misrepresentation Act 1967.

## B. DUTY TO RECALL

79 The CPA does not itself provide for a producer's liability for damage caused by its failure to recall a dangerous product, but in appropriate circumstances a duty to recall and a corresponding liability for breach of that duty can arise at common law.<sup>135</sup> In practice, the content of that duty is likely to be shaped by the regulations relating to recall notices (considered below).

80 Regulation 15 of the General Product Safety Regulations 2005 deals specifically with recall notices. Subregulation 1 reads: 'where an enforcement authority has reasonable grounds for believing that a product is a dangerous product and that it has already been supplied or made available to consumers, the authority may serve a notice ("a recall notice") requiring the person on whom it is served to use his reasonable endeavours to organise the return of the product from consumers to that person or to such other person as is specified in the notice.' Regulation 2 defines an 'enforcement authority' as 'the Secretary of State, any other Minister of the Crown in charge of a government department, any such department and any authority or council mentioned in regulation 10'.<sup>136</sup> A 'product' is rather wordily described in reg 2. In short, any product intended or likely to be used by consumers, whether or not this was paid for, is covered. The provision extends to both new and second-hand products but is restricted to items supplied in the course of a commercial activity.<sup>137</sup> A 'dangerous product' is defined as a product other than a safe product, and a 'safe product' means 'a product which, under normal or reasonably foreseeable conditions of use including duration and, where applicable, putting into service, installation and maintenance requirements, does not present any risk or only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons': reg 2. In determining the foregoing, the following shall be taken into account: '(a) the characteristics of the product, including its composition, packaging, instructions for assembly and, where applicable, instructions for installation and maintenance, (b) the effect of the product on other products, where it is reasonably foreseeable that it will be used with other products, (c) the

<sup>135</sup> *Rivtow Marine Ltd v Washington Iron Works* [1974] SCR 1189 (Canadian Supreme Court).

<sup>136</sup> I.e. a county council, district council, London Borough Council, the Common Council of the City of London in its capacity as a local authority: reg 10(4).

<sup>137</sup> The precise definition is: 'a product which is intended for consumers or likely, under reasonably foreseeable conditions, to be used by consumers even if not intended for them and which is supplied or made available, whether for consideration or not, in the course of a commercial activity and whether it is new, used or reconditioned and includes a product that is supplied or made available to consumers for their own use in the context of providing a service. "Product" does not include equipment used by service providers themselves to supply a service to consumers, in particular equipment on which consumers ride or travel which is operated by a service provider'.

presentation of the product, the labelling, any warnings and instructions for its use and disposal and any other indication or information regarding the product, and (d) the categories of consumers at risk when using the product, in particular children and the elderly. The feasibility of obtaining higher levels of safety or the availability of other products presenting a lesser degree of risk shall not constitute grounds for considering a product to be a dangerous product’.

**81** A recall notice may only be issued in specific instances, namely where: ‘(a) other action which an enforcement authority may require under [the General Product Safety Regulations 2005] would not suffice to prevent the risks concerned to the health and safety of persons, (b) the action being undertaken by the producer or the distributor concerned in fulfilment of his obligations under these Regulations is unsatisfactory or insufficient to prevent the risks concerned to the health and safety of persons, and (c) the authority has given not less than seven days notice to the person on whom the recall notice is to be served of its intention to serve such a notice and where that person has before the expiry of that period by notice required the authority to seek the advice of such person as the Chartered Institute of Arbitrators determines on the questions of – (i) whether the product is a dangerous product, (ii) whether the issue of a recall notice is proportionate to the seriousness of the risk, and the authority has taken account of such advice’: reg 15(4). The details of what the recall notice may require are stated in reg 15(2). Where an enforcement authority has been unable to identify any person on whom to serve a recall notice, or the person on whom such a notice has been served has failed to comply with it, then the authority may itself take such action as could have been required by a recall notice: reg 15(9). In the latter case, the authority may recover from the person on whom the notice was served summarily as a civil debt, any costs or expenses reasonably incurred by it: reg 15(10).<sup>138</sup> Of course, a person who has suffered personal injury or property damage as a result of using the dangerous product may pursue a civil action against the producer, etc, of the product under the CPA, among other avenues. However, reg 42 states that the Regulations shall not be construed as conferring any right of action in civil proceedings in respect of any loss or damage suffered in consequence of a contravention of these Regulations. As noted above, the Regulations may yet be relevant in construing the content of the common law duty to recall. Further, the authority may be liable to pay compensation to a person on whom an improper notice was served in respect of any loss or damage suffered by reason of the notice: reg 16. Criminal liability may ensue for the contravention of various provisions under the Regulations: reg 20 (see no 83 f).

<sup>138</sup> Magistrates’ Courts Act 1980, sec 58.

## C. SOCIAL SECURITY

82 A person injured by a defective product would of course be entitled to rely on his social security rights. In particular, he may seek free medical consultation before a practitioner that is contracted by the National Health Service (NHS) and he may also seek free NHS hospital treatment. The NHS has a (capped) right of recourse against the tortfeasor under sec 150 of the Health and Social Care (Communities Health Standards) Act 2003, a task undertaken by the Department for Work and Pensions' Compensation Recovery Unit (CRU). An injured person could also be entitled to other social security benefits, for example disability benefits. The value of such benefits may be liable to recoupment by the CRU on behalf of the Secretary of State under the Social Security (Recovery of Benefits) Act 1997.

## D. CRIMINAL OFFENCES

83 A whole host of potential criminal offences can arise in connection with defective products. In the case of death or personal injury, these include manslaughter and causing actual bodily harm (ABH). Companies may be liable under the Corporate Manslaughter and Corporate Homicide Act 2007. There is no individual liability under that Act; therefore, the penalty is limited to a fine, albeit of unlimited amount. A director or employee could also be liable for the common law offence of manslaughter, but this is unlikely in the product liability context. The General Product Safety Regulations 2005 also establish a number of criminal offences. In addition to the criminal liability for breach of the regulations on recall notices discussed above (see no 79 ff), it may be noted that a person who contravenes reg 5 (placement of an unsafe product on the market), *inter alia*, is guilty of an offence and may be punished by fine, imprisonment or both: reg 20(1). A defence of due diligence (ie that the person took all reasonable steps and exercised all due diligence to avoid committing the offence) exists under reg 29.

84 The Health and Safety at Work Act 1974 supplements the General Product Safety Regulations 2005 which do not apply in the case of products used in the workplace. Section 6 of the 1974 Act imposes a duty on any person who designs, manufactures, imports or supplies any article for use at work or any article of fairground equipment, *inter alia*, to ensure, so far as is reasonably practicable, that the article is safe and without risks to health. In addition to civil liability under sec 47, breach of the above duty is also an offence under sec 33 and is punishable by fine, imprisonment or both.



## E. ADMINISTRATIVE LAW

85 Relevant government authorities are also equipped with administrative powers under the General Product Safety Regulations 2005 including the power to suspend sale (reg 11), organise appropriate checks on the safety properties of a product (reg 21) and to enter and search business premises connected with the production of a product (reg 22).

## X. ASSESSMENT OF DOMESTIC LAW

86 It took 12 years after its entry into force for a claim resulting in a reported judgment to be brought under the CPA. This notwithstanding, an increasing number of persons seek to rely upon the Act; this is more a trickle than it is a flood, though. Moreover, such actions have been pursued with various degrees of success.

87 Several reasons have been posited as to why the scale of product-related litigation under the Act has not taken off as expected, including the Act's limited scope. There might be advantages of suing in tort (eg where a product was not put into circulation) or for defects in quality in contract (since the seller is more likely to be local). There is also evidence in the UK that consumers have always been less active in respect of damage by defective products. An empirical examination of pre- and post-implementation data could confirm the generally held view that claims consciousness is localised to specific wrongs. Expenses involved (eg for discovery of documents and experts) as well as to the influence of the legal profession, as gatekeepers of the courts, are other explanations. Regard must be had, in the former case, to the restriction of contingency fees to or their predominance in select areas, for example personal injury at work or on the road. The availability of non-legal avenues is a further factor. It is also very likely that a large proportion of claims settle informally out of court.<sup>139</sup>

88 As to the question of whether the Directive has been correctly implemented in national law, the litigation by the Commission (see no 64) illustrates that the latter had some reservations. However, the ECJ did not consider the UK implementing legislation to be manifestly contrary to the Directive, at least insofar as the defence under art 7(e) of the Product Liability Directive was concerned, but it did give guidance as to how it considered it should be interpreted. Indeed, at least one commentator has said that the CPA 'probably

<sup>139</sup> See *Lunney/Oliphant* (fn 20) 595 for further details.

represents the truest implementation' of the 1985 Directive among the major EU Member States.<sup>140</sup>

89 In the authors' view, the definition of a 'product' does seem apt to cover the new technologies specifically discussed in the introduction to this book. That is not to say, however, that claimants would not face difficulties in proving certain aspects of their claim.

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<sup>140</sup> *W van Gerven/J Lever/P Larouche*, Cases, Material and Text on National, Supranational and International Tort Law (2000) 668.